No. 20196

United States Court of Appeals
For the Ninth Circuit

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellant*,
vs.
CITY OF SEATTLE, *Appellee*.
CITY OF SEATTLE, *Appellant*,
vs.
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

FINAL BRIEF OF CITY OF SEATTLE AS APPELLANT

A. L. NEWBOULD
Corporation Counsel
G. GRANT WILCOX
Assistant Corporation Counsel
RICHARD S. WHITE
WILLIAM A. HELSELL
Special Counsel
Attorneys for City of Seattle

1610 Washington Building
Seattle, Washington 98101

THE ARGUS PRESS, SEATTLE, WASHINGTON

No. 20196

United States Court of Appeals
For the Ninth Circuit

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellant,*
vs.
CITY OF SEATTLE, *Appellee.*
CITY OF SEATTLE, *Appellant,*
vs.
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellee.*

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

FINAL BRIEF OF CITY OF SEATTLE AS APPELLANT

A. L. NEWBOULD
Corporation Counsel
G. GRANT WILCOX
Assistant Corporation Counsel
RICHARD S. WHITE
WILLIAM A. HELSELL
Special Counsel
Attorneys for City of Seattle

1610 Washington Building
Seattle, Washington 98101

THE ARGUS PRESS, SEATTLE, WASHINGTON

CITATIONS

CASES:

STATUTES AND MISCELLANEOUS

United States Court of Appeals
For the Ninth Circuit

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY,	*Appellant,*	
vs.		
CITY OF SEATTLE,	*Appellee.*	
CITY OF SEATTLE,	*Appellant,*	No. 20196
vs.		
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY,	*Appellee.*	

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

FINAL BRIEF OF CITY OF SEATTLE AS APPELLANT

The City's argument in support of its appeal is included as Part Two (P. 62-79) of its Combined Brief. In that argument we set forth two points. First, we pointed out that the navigation servitude doctrine applies to all lands lying below ordinary high water. The P.U.D. concedes this point (P.U.D. Final Br. 54). Second, we asserted that Seattle is vested in these Section 21 proceedings with the navigation servitude right. The P.U.D. has not joined this issue. It ignores the cases principally discussed by us, such as *Grand River Dam Authority v. Grand Hydro*, 335 U.S. 359 (1948). Instead, it raises a

counterissue — that the rights in question are rights in *water,* not in land, and are protected by Section 27 of the Power Act. Before analyzing this theory, we shall review the basis of the servitude doctrine.

In *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 627-628 (1961), the Supreme Court set forth a clear explanation of the doctrine:

> " 'This navigational servitude — sometimes referred to as a 'dominant servitude,' Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 [74 S.Ct. 487, 493, 98 L.Ed. 686], or a superior navigation easement,' United States v. Grand River Dam Authority, 363 U.S. 229, 231 [80 S.Ct. 1134, 1136, 4 L.Ed2d 1186]—is a privilege to appropriate without compensation which attaches to the exercise of the 'power of the government to control and regulate navigable waters in the interest of commerce.' United States v. Commodore Park, 324 U.S. 386, 390 [65 S.Ct. 803, 805, 89 L.Ed 1017]. The power 'is a dominant one which can be asserted to the exclusion of any competing or conflicting one.' United States v. Twin City Power Co., 350 U.S. 222, 224-225 [76 S.Ct. 259, 260-261, 100 L.Ed 240]; United States v. Willow River Power Co., 324 U.S. 499, 510 [65 S.Ct. 761, 767, 89 LEd. 1101]. A classic description of the scope of the power and of the privilege attending its exercise is to be found in the Court's opinion in United States v. Chicago, M., St. P. & P. R. Co.: [312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064].
>
> " 'The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing cases.] The

> damage sustained results not from a taking of the riparian owner's property in the stream bed, but from lawful exercise of a power to which that property has always been subject.' 312 U.S. 592, 596-597 [61 S.Ct. 772, 775, 85 L.Ed. 1064].' "

It thus appears that the easement attaches to the exercise of the power to control and regulate commerce. Issuance of a license to Seattle by the Federal Power Commission was a delegation of the right to exercise that power. These Section 21 proceedings are an actual exercise of that right by Seattle, as licensee and agent of the Federal Government. The taking of the P.U.D.'s land interests lying below ordinary high water is a lawful exercise of a power to which the lands had always been subject. It is not, as the P.U.D. asserts, an attempt to strip the P.U.D. of property without "just" compensation (P.U.D. Final Br. p. 70-71). The P.U.D. and its predecessors always held these rights subject to the possibility that the Federal Government might one day exercise its power to control or regulate commerce in this stretch of the Pend Oreille, and that if the Government did not develop the river itself, it might select some instrumentality other than the P.U.D. to do so.

The P.U.D.'s principal argument is that this power or servitude would not, in any event, apply to its property interests since they were vested water rights. Somewhat the same issue inheres in the P.U.D.'s appeal, as it relates to one phase of the testimony of Mr. Courtney (See Seattle Combined Br. p. 47-49). As we pointed

out in our Combined Brief, Section 27 relates only to the "control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." The simple and complete answer to the P.U.D.'s argument is that the P.U.D. never had any such vested rights.

The P.U.D. argues first that R.C.W. 54.16.050 which provides that a Public Utility District "may occupy and use the beds and shores up to the high water mark of any . . . lake, river, or watercourse," gives it some such vested right (P.U.D. Final Br. p. 4). But R.C.W. 54.16.050 by its terms merely gives a public utility district the power to acquire the right to use the bed of a river in connection with a structure for "storing, retaining, and distributing water." The P.U.D. never acquired any such right. Furthermore, the P.U.D. confuses, as it also does in construing Chapter 125 of the Laws of 1907 (Text is set out in Appendix to Opening Br. of P.U.D., p. 99), the right to occupy lands with the right to appropriate water. Chapter 125 gives applicants to the state, upon approval, the right to "overflow any such [state] land and inundate the same . . ." This was the right held by the P.U.D. as Parcel 3, easement over shorelands (See Seattle's Combined Br. p. 8).

The P.U.D.'s interpretation of Chapter 125 and of its easement, confuses a right to use state land with a right to use the waters of the Pend Oreille River. The distinction may be illustrated by an analogy. An easement

by the owner of a field to someone to run sheep in a pasture does not give the grantee any right to any sheep. The sheep must be acquired separately. Section 27 of the Power Act by its terms relates only to vested rights in water. It does not purport to affect easements to store water on shorelands.

Neither the P.U.D. nor any predecessor of the P.U.D. ever acquired any state water right. Even if it be assumed, contrary to the law,* that the P.U.D. or its predecessor had some right in the navigable waters of the Pend Oreille River by virtue of its ownership of uplands and/or shorelands, such right would be dependent upon beneficial use. This court stated in regard to non-navigable waters in *United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897, 904 (9th Cir. 1964):

> "For the purpose of our decision, it is of no consequence whether the rights which are for adjudication here are appropriative rights or riparian rights. The settled law in the State of Washington is that riparian rights, their existence and continuation, are, like appropriative rights, dependent upon beneficial use."

Also see statements in footnote 5 at 330 F.2d 905.

The distinction between appropriative and riparian water rights was stated in *Wallace v. Weitman*, 52 Wn.2d 585, 588, 328 P.2d 157 (1958):

> "A right of *appropriation* is a right to a definite quantity of water. A riparian right is not a right to

*See Seattle Combined Br., p. 48.

> a specific *quantity* of water. It is the right to have the stream flow to and over the riparian land *as it is wont to do by nature* for the use of the owner." (Emphasis added to last two lines)

Thus, even assuming the P.U.D. had some sort of riparian right to use the waters of the Pend Oreille River, it would not follow that the P.U.D. could have, without more, appropriated any of the waters of the Pend Oreille River. It is certain that the P.U.D. could not have stored the Pend Oreille River in a reservoir and could not have diverted the river through penstocks into a powerhouse. Whatever the rights attaching to a riparian on a great navigable stream such as the Pend Oreille, they do not extend to damming and diverting its entire flow.

The P.U.D. next takes the position that CXLII of the Session Laws of 1891 (p. 327) did not purport to cover appropriation of water for power purposes (P.U.D. Final Br. p. 35-36), but was limited to "use of water for irrigation, mining and manufacturing purposes." This is incorrect. The law of 1891 covered not only irrigation, mining and manufacturing, but appropriations "for supplying cities, towns or villages with water, and for the use of water works." Use of the generic term "water works" manifested a legislative intent to have the act apply to water works constructed for any purpose, including generation of power.

Even if the P.U.D.'s contention that the 1891 Act did

not purport to cover appropriation of water for power purposes were accepted, the P.U.D.'s assertion that it owned vested *water* rights would still fail. In an article entitled, *Riparian and Public Rights to Lakes and Streams* (1960) 35 Wash. L. Rev. 580, Professor Ralph W. Johnson reviewed the relationship between the riparian and appropriation systems in Washington. In so doing, he discussed the circumstances under which riparian rights might be held to be vested as of the passage of the 1917 Water Code:

> "It has often been said that riparian rights are not gained by use, nor lost by disuse and that they are not merely appurtenances but are part and parcel of the land. Thus it could be urged that the 1917 code had no effect upon any of those rights, including the right to irrigate, because they all "existed" prior to the code and were preserved by its saving clause even though they had not yet been exercised. Strangely, the cases in this state have not yet clearly answered this question, although the executive branch has taken a definite stand on it. The supreme court opinion that sheds the most light here is *Brown v. Chase*. [125 Wash. 542, 217 Pac. 23 (1923)] Certain riparians on the Wenatchee River sought to block the issuance of an appropriation permit to nonriparian defendants. The permit would have allowed temporary storage of the water each year in Lake Wenatchee for release during the irrigation season. Although the riparians could show no harm to their lands either presently or prospectively they nevertheless contended they had a legal right to bar the appropriation. The court declined to agree, stating "Waters of nonnavigable streams in excess of the amount which can be beneficially used, either directly or prospectively, within a reasonable time, on, or in connection with riparian lands, are

subject to appropriation for use on nonriparian lands." Thus it would seem that in Washington the riparian right to appropriate water for use on riparian land is not always an "existing" right. If it were "existing" the court would have to hold that any appropriation that deprived one of this right could be made only upon the payment of "just compensation" to the riparian. It did not do so. Instead, it held that as against a conflicting prior appropriation under the code such a riparian right does not exist. *Does the Brown case also mean that if the riparian had not made his appropriation prior to June 6, 1917, and did not intend to do so within a reasonable time thereafter he is forever barred from taking such action? It would seem so, although the opinion does not directly answer the question. Under Brown v. Chase, a riparian* who on June 6, 1917, *had not actually appropriated water for use on his land and did not intend to do so within a reasonable time thereafter could not be said to have an "existing" right as of the date of the code. His right to appropriate is actually "gained" by present or prospective use. Not having been in existence at the time of the code it could not have been saved by the savings clause.*

"There is another reason why such a riparian right should not exist in this state. One of the basic purposes of the water code is to bring as much certainty as practicable to the ownership and control of water rights. If a riparian today could appropriate without proceeding through the code there would be no record of his appropriation in the state files, and the uncertainty already existing in this state by reason of pre-1917 riparian diversions would increase." ((1960) 35 Wash. L. Rev. 590-592).

In support of its argument that federal power licensees must compensate owners of state water rights as defined in Section 27 of the Act, the P.U.D. cites *Federal Power Commission v. Niagara Mohwk Power Corp.*, 347 U.S.

239 (1953), (P.U.D. Final Br. p. 60-68). Involved in that case was the question whether water rights under state law to the use of a navigable river for power purposes were abolished by the Federal Power Act. By a narrow 4 to 3 majority, the Court held they were not within the navigation servitude doctrine. The *Niagara Mohawk* decision is totally irrelevant here, since the Court in its analysis was expressly considering *water* rights under state law, of which the P.U.D. has none.

The Court's conclusion in *Niagara Mohawk* was stated as follows:

> "We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the Government's dominent servitude, the Government has not exercised its power to abolish them." (347 U.S. at 248).

The Court of Appeals had held Section 27 to have "conclusive effect" (*Niagara Mohawk Power Corp. v. F.P.C.*, 202 F.2d 190, 205 (D.C. Cir. 1952). It is apparent from the Supreme Court's reliance upon *Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369 (1930) and *First Iowa Hydro-Electric Co-op v. F.P.C.*, 328 U.S. 152 (1946), both Section 27 cases, that the majority of the Court felt Section 27 to be controlling.

The complete contrast between the rights acquired from the P.U.D. in this case, and those involved in *Niagara Mohawk* may be demonstrated by the following excerpt from a footnote in the *Niagara Mohawk* opinion,

in which the Supreme Court refers to certain International Paper Company rights involved in that litigation:

> "Recovery by the International Paper Company for the deprivation of its use of the instant water rights in 1917 was authorized by this Court in 1931. Referring to the 730 c. f. s. now before us, Mr. Justice Holmes said for the Court: "From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second, — a right that by the law of New York was a corporeal hereditament and real estate." International Paper Co. v. United States, 282 US 399, 405, 75 L Ed 410, 413, 51 S Ct 176. The Government was obliged to pay for taking those diversionary rights by condemnation and they are the ones for which respondent is now paying an annual rental of $99,000. The deprivation, therefore, was not an exercise of the Government's dominant servitude, but was a compensable taking by condemnation of the paper company's recognized right to use the water. "[T]he Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal." Id. 282 US at 408." (347 U.S. 247, Footnote 11).

While the Paper Company was entitled to draw and was drawing for power purposes 730 cubic feet per second from the Niagara, the P.U.D. had no right to draw and had never drawn a single c.f.s. from the Pend Oreille at any time for any purpose whatsoever.

In sum, the crucial distinction between *Niagara Mohawk* and the present action is that the City did not acquire any rights of the P.U.D. under state law to the use of waters of the Pend Oreille River. Rather, the

City acquired fee and easement rights in certain shorelands and fee in certain uplands. There can be no question under the cases cited by us in our Opening Brief as Appellant (Part II of Combined Br. p. 68-78) that this Section 21 condemnation is an exercise of the dominant servitude in the interests of navigation. Exercise of that right requires no compensation. While the United States Supreme Court has never had occasion to pass squarely on this issue, as it relates to the exercise of the right by a Federal Power Act licensee, the reference by the majority in *Grand River Dam Authority v. Grand Hydro,* 335 U.S. 359, 373 (quoted at p. 76 of our Combined Brief) to exercise of Section 21 rights by the "United States or by one of its licensees" suggests that the Court, consistent with its other opinions, would hold that the navigation servitude would preclude compensation to the P.U.D. for interests lying below the high water line and for water power value, if any, of the uplands. To hold otherwise would be to confer a windfall on the P.U.D. As the minority of four Justices wrote in the *Grand Hydro* case:

> "The result of this decision, no matter how it is rationalized, is to give the water-power value of the current of a river to a private party who by reason of federal law neither has nor can acquire any lawful claim to it. The United States has asserted through the Federal Power Act its exclusive dominion control over this water power. That Act specifies how one may acquire a license to exploit it, § 23(b), 16 USCA §817, 5 FCA title 16, § 817, and the conditions under which the licensee must operate. See

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152, 90 L. Ed 1143, 66 S. Ct. 906.

> "Petitioner has such a license. Respondent has none and, for reasons unnecessary to relate here, concededly cannot obtain one. Respondent therefore has no claim to the water-power value which the law can recognize, if the policy of the Federal Power Act is to be respected . . ." (pp 375-76).

The decree below should be affirmed in all respects except that there should be excluded from the award any compensation for the P.U.D.'s shoreline interests.

Respectfully submitted,
A. L. NEWBOULD
Corporation Counsel

G. GRANT WILCOX
Assistant Corporation Counsel

RICHARD S. WHITE
WILLIAM A. HELSELL
Special Counsel
Attorneys for City of Seattle

1610 Washington Building
Seattle, Washington 98101

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By RICHARD S. WHITE
Of Counsel for City of Seattle
Appellee-Appellant